No. 06-677

In The

Supreme Court of the United States

GEORGE NICHOLAW,

Petitioner,

v.

INFINITY BROADCASTING CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent was sued under its former name, Infinity Broadcasting Corporation. On December 12, 2005, Infinity Broadcasting Corporation changed its name to CBS Radio Inc. CBS Radio Inc.'s ultimate parent company is CBS Corporation. CBS Corporation is a publicly traded company.

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I. INTRODUCTION

Three other courts, by applying well-settled California law to the unremarkable facts of this case, have already concluded that Petitioner's underlying employment claims fail as a matter of law. The analysis of those courts is set forth in carefully-reasoned, unpublished decisions that break no new legal ground. This petition for writ of certiorari represents a desperate, last-ditch effort by Petitioner to salvage his claims by asking this Court to intervene in a garden-variety state law discrimination case where Petitioner simply failed to produce sufficient evidence to sustain the case. This Court should deny Petitioner's petition for writ of certiorari.

The claimed age discrimination here arises from a single, nondiscriminatory comment allegedly made during a conversation about the management restructuring of two Los Angeles news radio stations operated by Respondent. This stray remark, which Petitioner himself claims was made well after the restructuring, does not lead to a rational inference of discriminatory animus. Petitioner's only other proffered "evidence" consists of his subjective personal judgment that he was more qualified than the candidate ultimately hired for the new position – an opinion unsupported by any objective evidence.

The trial court considered Petitioner's claims thoroughly and granted summary judgment to Respondent. The California Court of Appeal, recognizing that Petitioner's proffered "evidence" could not possibly support a finding that the restructuring was based on discriminatory animus, unanimously affirmed the trial court's grant of summary judgment in an unpublished opinion. (Petition for a Writ of Certiorari, Appendix ("App.") at 10.) The

California Court of Appeal also summarily denied Petitioner's petition for rehearing. The California Supreme Court followed suit by summarily denying Petitioner's petition for review. In short, all three state courts concluded that this straightforward state law claim of age discrimination broke no new ground and failed as a matter of California law.

Petitioner nevertheless asks this Court to intervene to address a purported lack of clarity in the standard under federal law for evaluating comparative qualifications evidence in employment discrimination cases. Petitioner's request should be rejected for two reasons. First, Petitioner fails to meet his burden of establishing that this Court has jurisdiction over his state law claim. Second, even if Petitioner establishes jurisdiction, strong prudential considerations counsel against this Court using its scarce resources on this clear-cut case.

II. STATEMENT OF RELEVANT FACTS

A. Factual Background

Petitioner George Nicholaw was the Vice President and General Manager of the radio station KNX for thirty-six years. *See* Appellant's Appendix in the California Court of Appeal, Volume I, page 4, lines 19-20 (hereinafter "__ AA __"). KNX and KFWB were AM all-news radio stations in Los Angeles that came under common ownership in 1995. (*See* I AA 62:14-19.)

In June of 2003, Joel Hollander became the Chief Operating Officer of Respondent Infinity Broadcasting

Corporation.[1] (*See* I AA 89.) Hollander wanted to get KNX and KFWB to work more closely together. (*See* I AA 234:10-11; 240:10-14; 89.) Throughout his long tenure running KNX, Petitioner viewed KNX as a competitor with KFWB. (*See* I AA 143:12-14; 144:6-7.) This was an approach that was inconsistent with Hollander's desire to get the stations to work more closely together. Based on this desire, Hollander decided to eliminate the separate positions of Vice President and General Manager of KNX and of KFWB and to have one person oversee both stations. (I AA 240:10-14; 89.) These facts were undisputed by Petitioner. (*See* II AA 586.)

Hollander chose Patrick Duffy to fill the new position of Vice President and Market Manager of Los Angeles News Stations. (I AA 89.) Duffy had been a General Manager at one of Respondent's other radio stations in Los Angeles for over ten years and had eighteen years of additional experience at KABC (AM) ("KABC"), where he became the General Sales Manager and handled the Los Angeles Dodgers radio broadcasts. (I AA 128:5-9; 129:13-17; 242:24-243:2; 89.) Hollander was aware of Duffy's managerial and sales skills, and was particularly interested in Duffy's experience working with the Dodgers because KFWB now broadcasts all Dodges games. (I AA 242:24-243:2; 89.)

Hollander also took into account the fact that Duffy had significant experience in the talk radio format, which features on-air personalities and differs significantly from news radio. (*See* I AA 89-90.) Petitioner presented no

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[1] On December 12, 2005, Infinity changed its name to CBS Radio Inc. For ease of reference to the record, that entity is referred to by its prior name here.

evidence that he had any such experience.[2] Hollander believed Duffy's talk radio experience would be particularly useful for format changes Hollander wanted considered at KNX and KFWB following the restructuring. (*Ibid.*) Hollander had known Duffy for a long time and believed his skills and experience made him the best person to fill the new position running KNX and KFWB. (I AA 90.)

Duffy was fifty-six years old at the time of the restructuring. (I AA 8; 127:14-15.) Duffy assumed the duties of Petitioner as well as those of KFWB's General Manager, Roger Nadel, who was fifty-two years old at the time of the restructuring.[3] (I AA 62:27-28.)

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[2] Petitioner incorrectly asserts that Respondent "conceded that Petitioner was qualified for the position of Vice-President and Market Manager of KNX and KFWB." (Petition for a Writ of Certiorari ("Pet.") at 3-4.) Respondent did nothing of the sort. Although Respondent did not dispute Petitioner's qualifications for his *previous* position, Respondent did dispute Petitioner's qualifications for the *new* position by adducing evidence that the new position required a candidate (1) who could get KNX and KFWB to work more closely together now that one person was overseeing both stations (*see* I AA 234:10-12; 240:10-14; 89); (2) who had experience working with the Dodgers now that KFWB was broadcasting all Dodger games (*see* I AA 242:24-243:2; 89); and (3) who had talk radio experience that would be particularly useful for format changes Hollander wanted considered at KNX and KFWB following the restructuring (*see* I AA 89-90). Even Petitioner's subjective self-assessment of his qualifications – which was the sole evidence of his qualifications before the trial court – tacitly conceded that he lacked these necessary qualifications for the new position. (II AA 402-404.)

[3] Petitioner wrongly asserts that Hollander made the decision to promote "the younger person." (Pet. at 5.) Although Duffy was younger than Petitioner, he was *older than Nadel,* who was also replaced. (I AA 62:27-28.) Further, at age fifty-six, Duffy was well within the class of those protected from age discrimination under state and federal law. (App. at 10.) These facts demonstrate that Hollander made the decision

(Continued on following page)

On August 21, 2003, several personnel changes at Infinity Broadcasting Corporation were announced, including the creation of the new position of Vice President and Market Manager of Los Angeles News Stations and Duffy's appointment to the position. (*See* I AA 90; 94-95.)

More than a month after the decision had been announced, Petitioner and Hollander met and Hollander confirmed that Duffy was running KNX. (I AA 168:7-13.) Petitioner expressed that he was "terribly hurt" that his position had been eliminated and that he was not running KNX. (I AA 221:12-15; 90-91.) Hollander attempted to express empathy for Petitioner during the conversation. (I AA 91.) Petitioner alleges that when he told Hollander that he was "terribly hurt" by the change in his position, Hollander responded, "I understand. My father-in-law is 79." (I AA 221:16-21; 169:10-12.) According to Petitioner, the conversation ended with Hollander stating that he "greatly appreciate[d] the fact that [Petitioner was] being a gentleman about this." (I AA 169:15-16.)

During the same meeting, Hollander also informed Petitioner that Respondent wanted him to continue with the company and that a job would be created for Petitioner at KNX, and Hollander asked Petitioner to meet with Duffy to discuss the new position. (I AA 169:7-8; II AA 574:16-17.) Petitioner indicated he would be interested in a "senior vice president" position. (I AA 170:5-6; 170:23-171:3; 212:3-14.) That same day, Duffy met with Petitioner to attempt to define Petitioner's new position at the station. (I AA 7.) However, Petitioner refused to provide

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to promote the person with the necessary qualifications for the new direction for the two radio stations, *regardless of age*.

any further input on the scope of his new position at KNX. (I AA 173:16-18.)

Duffy and a human resources manager from the company then presented Petitioner with a written job description as the Senior Vice President, News and Public Affairs for KNX and KFWB.[4] (*See* I AA 179:15-21; 247-248; 209:3-20; 133:8-15.) Petitioner was also given a notification that he was eligible for a severance package worth over $450,000 should he decide not to accept the offered position. (I AA 249-252; 180:4-7; 213:22-214:2; 138:12-139:1.) Petitioner did not provide any feedback or suggestions on how the offered position could be improved. (I AA 182:5-11.) Instead, on October 10, 2003, Petitioner's attorney sent a letter to Respondent's in-house counsel stating that Petitioner was rejecting the offered position as well as the $450,000 severance package. (*See* I AA 98-99.)

B. Procedural Background

Petitioner filed a lawsuit on April 7, 2004 alleging age discrimination in violation of California's Fair Employment and Housing Act, and a number of other state law claims not before this Court.[5] Petitioner raised no federal

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[4] Roger Nadel, the former general manager of KFWB whose position was also eliminated and who is younger than both Petitioner and Duffy, was not offered another position of any kind. (I AA 36; 62:27-28; III AA 614.)

[5] Petitioner does not seek review of the California Court of Appeal's decision affirming summary judgment on his claims for wrongful termination, breach of implied contract, and breach of implied covenant of good faith and fair dealing. (App. at 11-19.) Thus, those rulings are now final and are not before this Court.

claims at any point during his lawsuit, despite amending his complaint three times. (*See* I AA 1.)

In March 2005, Respondent moved for summary judgment on all claims. Petitioner opposed the motion for summary judgment and submitted a declaration offering his subjective personal judgments about his own qualifications and Duffy's lack thereof. (II AA 402-404.) The trial court granted Respondent's motion on July 6, 2005 and later affirmed that ruling by an order on August 9, 2005. (IV AA 961-965.)

On August 12, 2005, Petitioner filed a Notice of Appeal of the judgment. (IV AA 966-967.) After Petitioner filed his Opening Brief but before Petitioner filed his Reply Brief, this Court decided *Ash v. Tyson Foods, Inc.*, 126 S.Ct. 1195 (2006). In *Ash*, this Court reversed in part the Eleventh Circuit's decision to affirm a grant of a motion for judgment under Federal Rule of Civil Procedure 50(b) in favor of an employer in a race discrimination case, after the jury had already awarded compensatory and punitive damages to the employees. *Id.* at 1196. This Court held that the Eleventh Circuit erred in two respects: (1) by determining that the use of the term "boy," unaccompanied by a racial modifier, was not evidence of discrimination, and (2) by requiring that the disparity between the employees' qualifications and the other candidates' qualifications be "so apparent as virtually to jump off the page and slap you in the face." *Id.* at 1197. In Appellant's Reply Brief in the California Court of Appeal, Petitioner cited the first holding in *Ash* for the proposition that "the speaker's discriminatory meaning may depend on his inflection and tone of voice." (*See* Appellant's Reply Brief at 3, 4.) Petitioner did not cite the second holding in *Ash* regarding the comparison of qualifications.

Oral argument was held on May 23, 2006. In a unanimous and unpublished decision filed on May 30, 2006, the California Court of Appeal affirmed the entry of summary judgment in favor of Respondent. The California Court of Appeal determined that Respondent established a nondiscriminatory reason for its challenged employment decisions, and that Petitioner's various allegations failed to rebut that nondiscriminatory basis. (App. at 10-11.) Specifically, "[w]ith regard to Nicholaw's subjective claim that he was more qualified for the new position than Duffy, Nicholaw presented no objective evidence to support this claim. In any event, his subjective belief was not enough." (App. at 11 (citing *Horn v. Cushman & Wakefield Western, Inc.,* 72 Cal.App.4th 798, 816 (1999).) In addition, the California Court of Appeal held that, "Hollander's comment is nothing more than a 'stray remark,' which is insufficient to establish a triable issue of material fact regarding discriminatory motive." (App. at 12 (citing *Horn*).)

The California Court of Appeal's decision rested on state law grounds and cited primarily from two California cases – its own decision in *Horn* and the California Supreme Court's decision in *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317 (2000). Together, these two cases establish the applicable summary judgment standard for California employment discrimination cases. The California Court of Appeal's decision did not cite *Ash*, which did not involve summary judgment. In fact, the only references to federal law in the California Court of Appeal's nineteen-page decision were three short sentences – two introductory references to the general similarity between the state and federal tests for discrimination and one string citation listing *Horn* followed by a few supportive federal cases.

Petitioner filed a Petition for Rehearing that argued, among other things, that rehearing was necessary to consider the United States Supreme Court's ruling in *Ash v. Tyson Foods, Inc.*, ___U.S. ___, 126 S.Ct. 1195 (2006). The California Court of Appeal summarily denied the Petition for Rehearing. (App. at 35.) Petitioner then filed a Petition for Review in the California Supreme Court, similarly arguing that review was necessary to determine how *Ash* applied in this case. The California Supreme Court summarily denied the Petition for Review. (App. at 36.)

III. PETITIONER HAS NOT MET HIS BURDEN OF ESTABLISHING THAT THIS COURT HAS JURISDICTION TO REVIEW THE CALIFORNIA COURT OF APPEAL'S DECISION

"A party seeking review in the Supreme Court bears the burden of affirmatively establishing the court's jurisdiction, and any doubts as to the existence of that jurisdiction are to be resolved against that party." 2 Fed. Proc., L. Ed. § 3:17 (Thomson/West 2006); *see also Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 70-71 (1948) ("Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. . . . The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction.") (citation omitted).

In particular, this Court has stated that "we have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment." *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986). As this Court has explained, the reason "is found in the partitioning of power between the state and federal judicial systems and in the

limitations of our own jurisdiction." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

A. The California Court of Appeal's Decision Was a Correct Application of Well-established State Law

In this case, Petitioner's age discrimination claim arose under California's Fair Employment and Housing Act (FEHA). Three California courts on four separate occasions have ruled that Petitioner's age discrimination claim lacked merit as a matter of law and affirmed summary judgment for Respondent. The uniformity of these state court decisions stems from how clearly state law dictates the result in this case, as set forth in the California Court of Appeal's unanimous decision. (*See* App. at 8-13.) Indeed, the result in this case was so unremarkable that the California Court of Appeal did not deem it worthy for publication. *See* California Rules of Court, Rule 976(c) (permitting publication of an opinion by the California Court of Appeal if it "establishes a new rule of law," "applies an existing rule to a set of facts significantly different from those stated in published opinions," or "resolves or creates an apparent conflict in the law").

Nonetheless, Petitioner invites this Court to accept review to decide "what is the standard for determining whether a comparison of qualifications for employment suffices to show that the defendants-employers' asserted nondiscriminatory reasons for their employment decisions were pretextual." (Pet. at (i).) Petitioner, however, ignores the fact that *Horn* and *Guz* have already answered the question under California law. In the summary judgment context, once the employer has presented competent

evidence of nondiscriminatory reasons for its employment decision, the employee must "*rebut* this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred" in order to sustain his claims. *Guz,* 24 Cal.4th at 357 (emphasis in original). To avoid summary judgment, an employee "must do more than establish a prima facie case and deny the credibility of the defendant's witnesses. He must produce specific, substantial evidence of pretext." *Horn*, 72 Cal.App.4th at 807 (internal punctuation and citations omitted).

Petitioner argues that his subjective personal judgments about his own qualifications were sufficient to overcome summary judgment, regardless of which stage of the three-part burden-shifting test is at issue. (*See* Pet. at 13 (attempting to argue that an employee's own declarations and testimony are permitted to "establish" their qualifications).) However, Petitioner conflates the three stages of the burden-shifting test under California employment law, as set forth in *Guz* and *Horn*. Contrary to Petitioner's apparent misperception, the California Court of Appeal did not hold that Petitioner had failed to make out a *prima facie* case of age discrimination based on Petitioner's assertion of his job qualifications. Rather, the California Court of Appeal held that he had failed to sufficiently *rebut* Respondent's nondiscriminatory reasons for promoting Duffy instead of Petitioner with specific, substantial evidence of discriminatory animus. (App. at 10-11.) And applying *Horn*, the California Court of Appeal specifically found that Petitioner's "subjective claim that he was more qualified for the new position than Duffy"

was insufficient as a matter of California law to pass muster as specific, substantial rebuttal evidence.[6] (App. at 11 (noting also that Petitioner "presented no objective evidence to support this claim").)

Here, just as in *Guz* and *Horn*, summary judgment in favor of the employer was affirmed because Petitioner was unable to establish that Respondent's proffered business reason for its action was pretextual. *Cf. Guz*, 24 Cal.4th at 369-370 (holding the employee's evidence raised, at best, only a weak suspicion of discrimination, which was insufficient as a matter of law to raise a triable issue when weighed against the employer's presentation of a plausible, and largely uncontradicted, explanation that the decisions at issue were made for reasons unrelated to age); *Horn,* 72 Cal.App.4th at 816-817 (affirming summary judgment where the employee did not produce substantial evidence that the employer's proffered reasons were pretexts for an improper discriminatory motive and holding that the employee's subjective personal judgment of his competence does not raise a genuine issue of fact as to whether he was discriminated against). After four previous (and unsuccessful) attempts to show why this straightforward application of state law was erroneous, Petitioner's last-ditch effort to breathe life into his case is to seek a writ of certiorari from this Court. That effort should be rejected.

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[6] Notably, *Horn* specifically states that an employee *cannot* avoid summary judgment by "simply show[ing] the employer's decision was wrong, mistaken, or unwise." (*Horn*, 72 Cal.App.4th at 807.) Were that not the rule, any employee claiming discriminatory termination could avoid summary judgment by self-servingly opining about his own qualifications without presenting any independent, objective evidence.

B. The California Court of Appeal's Decision Did Not "Rest Primarily on or Interweave" Federal Law

Notwithstanding the clear state law basis for the California Court of Appeal's unanimous and unpublished decision, Petitioner claims that this Court has jurisdiction over this case because the California Court of Appeal's decision "rests primarily on or interweaves federal law regarding the right to be free from age discrimination in employment." (Pet. at 2.) This is a strained attempt to wring a federal issue out of a state law case, driven by a wishful reading of the California Court of Appeal's decision and a misunderstanding about the bounds of this Court's jurisdiction.

First, any suggestion that the California Court of Appeal's decision "rests primarily" on federal law is absurd, where only three short sentences of the California Court of Appeal's nineteen-page opinion even refer to federal law. The first two sentences are generic references to the similarity between the state and federal tests for discrimination. (App. at 8-9.) Although the California Court of Appeal preliminarily notes the adoption of the three-stage burden-shifting test established by the United States Supreme Court, the subsequent discussion of the test refers to state cases interpreting and applying that test. The third sentence is a string citation that cites *Horn*, followed by a few supportive federal cases (App. at 12) that agree with the proposition already established in *Horn* – that stray remarks are insufficient to establish a triable issue of fact regarding discriminatory motive.[7] *See Horn*,

[7] Notably, these federal cases were cited in support of the point that "stray remarks" are not sufficient to overcome summary judgment

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72 Cal.App.4th at 810. There is nothing to suggest (and Petitioner does not claim) that these few federal cases played a determinative role in the California Court of Appeal's analysis, beyond acknowledging a general similarity between state law and federal law in this area.[8]

Second, any suggestion that the California Court of Appeal's decision "interweaves" federal law depends on an unsupportably expansive view of this Court's jurisdiction. That there may be a "right to be free from age discrimination in employment" that happens to be generally protected by both state and federal law (*see* Pet. at 11) does not mean that the California Court of Appeal's decision was specifically based on "interwoven" state and federal law or was specifically "compelled" by federal law. "[E]ven though a state court's opinion relies on similar provisions in both [state and federal law] . . . the state [law] has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment." *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 491-92 (1965) (citations omitted).

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in employment discrimination cases, which is a different issue than the one that forms the basis of Petitioner's present request for review by this Court. (*See* Pet. at (i) (stating that the question presented concerns the standard "for determining whether a comparison of qualifications for employment suffices" to overcome nondiscriminatory reasons for employment decisions).)

[8] While state and federal law in this area may be similar, they are not necessarily identical. In light of California's unique standard for summary judgment, some California courts actually reverse the evidentiary burdens in the three-part burden-shifting test on a defense motion for summary judgment against a claim of discrimination in employment. *Guz*, 24 Cal.4th at 380. This is another reason not to presume that federal law played a determinative role, if any at all, in the California Court of Appeal's decision.

In *Jankovich*, this Court reviewed a state court decision invalidating an airport zoning ordinance. During the appeal to the Indiana Supreme Court, the respondent relied on both the just compensation requirement of the Indiana Constitution as well as the Due Process Clause of the Fourteenth Amendment. In its ultimate ruling in favor of the respondent, the Indiana Supreme Court (1) defined the issue for decision as implicating both the Indiana Constitution and the Fourteenth Amendment, (2) "did not analyze separately the effect of the two provisions but considered them together," and (3) cited both state and federal cases. *Id.* at 490-91. Nonetheless, this Court held that there was no evidence that the references to federal law meant that the Indiana Supreme Court's decision "flow[ed] from a federal rather than a state source. Indeed, the organization and language of the opinion indicates that, at the least, state law is an equal ground of decision." *Id.* at 491.

The Indiana Supreme Court in *Jankovich* relied far more heavily on federal law than the California Court of Appeal did in this case. Yet this Court nonetheless concluded in *Jankovich* that there was an adequate and independent ground for the state court's decision, noting that it was not a case "where the lower court opinion as a whole [left] the impression that the court felt constrained to rule as it did" by federal law. *Id.* at 492 (internal quotation marks omitted). Similarly, there is no evidence in the California Court of Appeal's decision that it felt in any way constrained by federal law to reach its decision.[9]

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[9] For this reason, Petitioner's citation to *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138 (1984) is inapposite. There, the North Dakota Supreme Court refused jurisdiction over a lawsuit

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Citing *Michigan v. Long*, 463 U.S. 1032 (1983), Petitioner argues that this Court should presume that the failure to address *Ash* by the California Court of Appeal and the California Supreme Court is evidence that both courts "believed, *sub silentio*, that federal law required the summary judgment for the Respondent." (Pet. at 10.) Petitioner, however, quotes selectively from *Long*. As a result, Petitioner ignores the threshold requirement before this Court will apply the *Long* presumption: the presumption only applies "when . . . a state court decision *fairly appears* to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground *is not clear from the face of the opinion. . . .*" *Id.* at 1040-41 (emphasis added). There, this Court pointed to the state court's near-exclusive reliance on federal law and applied the presumption:

> Apart from its two citations to the state constitution, the court below relied *exclusively* on its understanding of [a federal search and seizure case] and other federal cases. Not a single state case was cited to support the state court's holding

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against a non-Native American on tribal land. The North Dakota Supreme Court dismissed the petitioner's state and federal claims because it felt compelled to defer to the "explicit authority granted by Congress in the exercise of its federal power over Indians." *Id.* at 154. In fact, this Court acknowledged that the North Dakota Supreme Court's decision "would have been different if the court realized from the outset that federal law does not insulate the present jurisdictional disclaimer from state and federal constitutional scrutiny." *Id.* In other words, there, the state court *refused* to adjudicate state *and federal claims* because of its interpretation of *federal law* in an area traditionally reserved for *federal jurisdiction*. By contrast, here, the California Court of Appeal *did* adjudicate Petitioner's *state claims* because of its interpretation of *state law* in an area comfortably within *state jurisdiction*.

> that the search of the passenger compartment was unconstitutional. Indeed, the court declared that the search in this case was unconstitutional because [t]he Court of Appeals erroneously applied the principles of [the federal search and seizure case].

Id. at 1043 (emphasis in original; citation and internal punctuation omitted). This case, by contrast, represents the polar opposite: apart from three sentences in its nineteen-page decision, the California Court of Appeal relied exclusively on its understanding of California's employment discrimination statute and cited exclusively to state cases. There is no basis to suggest that it "fairly appears" that the California Court of Appeal's decision rested primarily on or interwove federal law.

Where the state law on an issue is clear and forms the central basis for a state court's decision, an express refusal to consider federal law is unnecessary. "A state court, as busy as any other, may justifiably concentrate on reaching the best decision in a case that presents related state and federal grounds. If federal and state law both seem to point in the same direction, there may be little reason to decide each ground separately." 16B Charles Alan Wright, et al., *Fed. Prac. & Proc. Juris. 2d* § 4032 at 436 (1996).

Conversely, if Petitioner were correct and the general similarity between state and federal employment law were deemed sufficient for conferring jurisdiction on this Court, that would render *every single California employment law case* reviewable by writ of certiorari. This would violate the maxim that this Court is a court of limited jurisdiction. *See* 28 U.S.C. § 1257 (conferring jurisdiction on this Court in limited situations); 2 Fed. Proc., L. Ed. § 3:16 (Thomson/West 2006) (noting that the jurisdictional

statute must be strictly construed). *See also Long*, 463 U.S. at 1040 ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). Respondent respectfully submits that Petitioner has not met his burden for establishing this Court's jurisdiction to hear this case.

IV. EVEN ASSUMING THAT PETITIONER HAS MET HIS BURDEN OF ESTABLISHING THIS COURT'S JURISDICTION, STRONG PRUDENTIAL CONSIDERATIONS COUNSEL AGAINST GRANTING A WRIT OF CERTIORARI IN THIS CASE

Notwithstanding the absence of any claim to this Court's jurisdiction, Petitioner asks this Court to revisit the very recently decided case of *Ash v. Tyson Foods, Inc.*, 126 S.Ct. 1195 (2006) and clarify "what standard should govern pretext claims based on superior qualifications." (Pet. at 7.) To avoid the appearance that this would be an abstract and advisory exercise, Petitioner claims that a "reasonable probability exists that this Court's more precise definition of the governing standard [under *Ash*] will cause the Court of Appeal below to find that the qualifications-evidence is sufficient for Petitioner's claim to be decided by a jury." (Pet. at 11.)

Even assuming that this Court has jurisdiction to grant Petitioner's request, there are strong prudential considerations against granting a writ of certiorari in this case. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."

U.S. Sup. Ct. R. 10. In particular, this Court has held that judicial discretion means using its limited resources to "correct wrong judgments, not [] revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Here, even if this Court clarified its ruling in *Ash* (assuming that anything needs clarification), there is no reason to believe that it would affect the outcome of the case at bar.

A. The California Court of Appeal's Decision Applied the State Summary Judgment Standard for State Employment Discrimination Claims, Which Was Not at Issue in *Ash*

As noted above, the California Court of Appeal's decision involved an application of the three-part burden-shifting test to the special circumstance of an employer's motion for summary judgment. After describing the three-part burden-shifting test generally, the California Court of Appeal stated: "*In the context of a summary judgment motion, however*, when the employer has presented competent evidence of nondiscriminatory reasons for its employment decision, as Infinity has done, the burden shifts to the employee to *rebut* this facially dispositive showing. . . ." (App. at 9-10 (first emphasis added; citation and internal punctuation omitted).) The California Court of Appeal goes on to analyze why, under *Guz* and *Horn*, Petitioner's proffered evidence fell short of his burden to raise triable issues of material fact. (App. at 10-13.)

Ash, by contrast, did not involve the summary judgment stage of proceedings. In fact, the petitioners in *Ash*

had actually been awarded compensatory and punitive damages after a full jury trial, only to have the Eleventh Circuit overturn the jury verdict on a motion for judgment under Federal Rule of Civil Procedure 50(b). *See Ash*, 126 S.Ct. at 1196. There is no reason to believe that this Court's reversal of the district court's order overturning the jury verdict in *Ash* would (or should) alter the California Court of Appeal's finding that Petitioner's case should not even reach a jury as a matter of law in this case.

Petitioner cites a number of post-*Ash* federal cases (most of which are unpublished) in order to create the illusion of a circuit split in the aftermath of *Ash*. (Pet. at 8-10.) First, it is worth noting that Petitioner did not cite any post-*Ash* cases dealing with California law. As there is no reason to believe that California courts' application of the state summary judgment standard in employment discrimination cases needs changing after *Ash*, this Court has no reason to intervene. Second, of the post-*Ash* cases cited by Petitioner, one does not bother to apply *Ash* at all to the summary judgment stage of proceedings. *See Barnette v. Chertoff*, 453 F.3d 513 (D.C. Cir. 2006) (involving summary judgment and failing to cite *Ash*). Other cases cite *Ash*, but ultimately conclude that *Ash* did not announce a new standard that would permit employees to easily avoid summary judgment. *See, e.g., Brooks v. County Comm'n of Jefferson County*, 446 F.3d 1160, 1163 (11th Cir. 2006) (holding that, even applying another standard approved by *Ash*, an employee's "belief that she was more qualified" was nevertheless irrelevant); *Tippie v. Spacelabs Med., Inc.*, 180 Fed. Appx. 51, 52 (11th Cir. 2006), *petition for cert. filed* (No. 06-304); *Truss v. Harvey*, 179 Fed. Appx. 583, 587-88 (11th Cir. 2006); *Roper v. Foley*, 177 Fed. Appx. 40, 42 (11th Cir. 2006); *Price v. M&H Valve*

Co., 177 Fed. Appx. 1, 4 (11th Cir. 2006); *Hubbard v. M&H Valve Co.*, 180 Fed. Appx. 899, 899 (11th Cir. 2006).[10]

None of these cases suggest that *Ash* has created a sea change in how courts (and certainly not California state courts) approach summary judgment in employment discrimination cases. Indeed, *Ash* itself declined to announce any such change: this Court explicitly stated that its decision "should not be read to hold that petitioners' evidence necessarily showed pretext." *Ash*, 126 S.Ct. at 1198. Therefore, contrary to Petitioner's claim, nothing that this Court could add to its decision in *Ash* would change the California Court of Appeal's straightforward and unanimous application of state summary judgment law in this case.

B. The California Court of Appeal's Decision Reaffirmed that an Employer's Nondiscriminatory Reasons for an Employment Decision May Not Be Rebutted by an Employee's Subjective Personal Judgments about His Qualifications, Which was Not at Issue in *Ash*

This Court held in *Ash* that "qualifications evidence may suffice, at least in some circumstances, to show pretext." *Ash*, 126 S.Ct. at 1197. Specifically, this Court rejected as unhelpful and imprecise the Eleventh Circuit's standard – that the disparity in qualifications is so apparent as virtually "to

[10] The only post-*Ash* case cited by Petitioner that reverses summary judgment for an employer is *Cornwell v. Electra Central Credit Union*, 439 F.3d 1018 (9th Cir. 2006), which is distinguishable because that case did not involve a plaintiff who was relying solely on his own subjective personal judgments to establish his superior qualifications for a job. *See* Part IV.B *supra*.

jump off the page and slap you in the face" – for measuring when qualifications evidence is sufficient to show pretext. *Id.* Petitioner argues that *Ash*, if properly considered by the California Court of Appeal, would have compelled a different result in this case. (Pet. at 11.)

This argument reflects a misunderstanding about the California Court of Appeal's decision, which explained that Petitioner's "subjective personal belief" that he was more qualified than Duffy was not supported by "objective evidence" and was not enough to raise a genuine issue of material fact. (App. at 11 (citing *Horn*).) Thus, the California Court of Appeal ruled on the lack of *qualitative* value to Petitioner's evidence (which consisted solely of Petitioner's subjective, self-serving declaration) and not the *quantitative* value of Petitioner's evidence (e.g., whether it demonstrated the superiority of Petitioner's qualifications, whether the superiority of Petitioner's qualifications "jumped off the page and slapped you in the face"). The California courts understandably rejected Petitioner's evidence, which was based entirely on Petitioner's "subjective belief."[11] (App. at 11.)

Therefore, no matter which of the standards discussed in *Ash* is applied to this case, there is no reason to believe

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[11] Even Petitioner's self-serving declaration failed to suggest that he would be better equipped than Duffy for the *new* position. As noted above, the new position required a candidate (1) who could get KNX and KFWB to work more closely together now that one person was overseeing both stations (*see* I AA 234:10-12; 240:10-14; 89); (2) who had experience working with the Dodgers now that KFWB was broadcasting all Dodger games (*see* I AA 242:24-243:2; 89); and (3) who had talk radio experience that would be particularly useful for format changes Hollander wanted considered at KNX and KFWB following the restructuring (*see* I AA 89-90).

that the California Court of Appeal would look any more charitably on the qualitative value of Petitioner's qualifications evidence. Indeed, one post-*Ash* case (cited by Petitioner himself) applied a different quantitative standard that had been approved in *Ash* and nevertheless concluded that the employee's "belief that she was more qualified" was irrelevant as a qualitative matter. *See Brooks*, 446 F.3d at 1163 (affirming summary judgment for employer).

Petitioner attempts to cover this fatal flaw in his case by stating that "federal law allows plaintiffs to rely on their own declarations and testimony regarding their qualifications." (Pet. at 13.) Yet none of the subsequent cases cited by Petitioner involved a claim of superior qualifications that hinged solely on the employee's subjective personal judgment of those qualifications. *See, e.g., Cornwell*, 439 F.3d at 1033 (involving deposition testimony by employer that employee "was the best qualified person to lead [company's] lending group"); *Raad v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185 (9th Cir. 2003); *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir. 1991) (involving deposition testimony by district manager that employee, who had "a good relationship with the staff," was passed over for candidate who "was not well liked by the group"); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998) (involving evidence that reviewers found employee "getting along well with others" and "creative," compared to one of the other candidates who "had received poor evaluations on his personality").[12]

[12] Petitioner also cited several unpublished Ninth Circuit cases, in violation of that Court's rules. *See* Ninth Cir. R. 36-3. Nonetheless, these citations are equally unavailing. *See, e.g., Tucevich v. Nevada,*

(Continued on following page)

Simply put, *Ash* did not hold that (and should not be interpreted to permit) a litigant's subjective personal judgments of his or her own qualifications are sufficient to rebut nondiscriminatory bases for an employer's decision. Nor should this Court accept Petitioner's invitation to adopt such a weakened standard, which would make it impossible to weed out unmeritorious discrimination claims before trial. And no clarification of *Ash* would change the fact that Petitioner's qualifications evidence comprised "subjective personal judgments" that were insufficient to overcome summary judgment under California law. *See Horn*, 72 Cal.App.4th at 816 (holding that "an employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact").

C. The California Court of Appeal's Decision Reaffirmed that an Employer's Nondiscriminatory Reasons for an Employment Decision May Not Be Rebutted by "Stray Remarks," Which Was Not at Issue in *Ash*

Petitioner's primary argument is that the Court should revisit *Ash* to clarify the standard for determining whether a comparison of qualifications for employment suffices to rebut an employer's nondiscriminatory explanation for its employment decision. (*See* Pet. at (i); Pet. at 16.) Because there is no basis or need for revisiting the

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1999 WL 62735, *1 (9th Cir. 1999) (involving deposition testimony from co-workers that employee "was a very capable worker who functioned well with other members of the maintenance crew"); *Haas v. Betz Labs., Inc.*, 1999 WL 451206, *2 n.2 (9th Cir. 1999) (involving testimony from former supervisor that employee was "proficient" at the computer and "much more qualified" than candidate who ultimately got the job).

standard for qualifications evidence, there is no reason to entertain Petitioner's second (and contingent) argument: that the clarified standard for qualifications evidence should explicitly take into consideration other evidence such as the allegedly "ageist tone" of Hollander's purported comment. (*See* Pet. at 16-17.)

Nothing in *Ash* requires (or should be interpreted to require) a court to accept isolated comments or "stray remarks" as sufficient evidence to rebut an employer's nondiscriminatory reasons for its employment decision. *Ash* stands for the limited proposition that a historically-fraught term such as "boy" need not be accompanied by a racial modifier in all instances to render the term *probative* of bias. *See Ash*, 126 S.Ct. at 1197. *Ash* did not, however, hold that an isolated comment was *sufficient proof* of bias to overcome an employer's showing of nondiscriminatory reasons in the summary judgment context.

Therefore, revisiting this point from *Ash* would have no bearing on the California Court of Appeal's decision in this case, which explained:

> Even if we view Hollander's isolated comment in the most negative light, it is insufficient to raise a reasonable inference that Infinity restructured the management of KNX and KFWB as a pretext for eliminating Nicholaw's position because of his age. Hollander's comment is nothing more than a "stray remark," which is insufficient to establish a triable issue of material fact regarding discriminatory motive.

(App. at 12 (citations omitted).) This conclusion by the California Court of Appeal was dictated by well-settled state law on the point that "stray remarks are insufficient to establish discrimination" at the summary judgment

stage. *See Horn*, 72 Cal.App.4th at 810 (affirming summary judgment for defendant employer).

Petitioner ignores this state law basis for the California Court of Appeal's decision. (*See* Pet. at 16-18.) Instead, Petitioner claims that the California Court of Appeal improperly chose to follow other federal precedents regarding "stray remarks" instead of following *Ash*. (*See* Pet. at 18 (taking issue with the California Court of Appeal's string citation to three Ninth Circuit decisions after citing to *Horn*).) The fundamental problem with this argument, however, is that *Ash* did not purport to challenge the well-settled rule about the insufficiency of "stray remarks" to rebut an employer's nondiscriminatory motivation.[13] Accordingly, *Ash* has no bearing on this ground for the California Court of Appeal's decision.

In short, there is nothing here that this Court is "compelled" to step in to correct. Under California law, Hollander's alleged comment falls well within the boundaries of the kind of "stray remark" that is simply "not enough" to rebut the ample evidence of Respondent's nondiscriminatory reasons for its employment decision. Neither *Ash* nor any other decision of this Court suggests

[13] Moreover, even assuming that *Ash* required a closer look at a "stray remark," there is no reason to believe that such an inspection would have produced a different result in this case. After all, Hollander's alleged comment is facially neutral. It did not even refer to Petitioner's age. It certainly carried no negative connotation, and it was allegedly made a month *after* the decision to restructure Petitioner's job. It is difficult to see how one could impute a malignant purpose to a remark three courts have already viewed as inherently benign, even when viewing the "isolated comment in the most negative light." (App. at 12.)

otherwise, and there is no need to retread well-founded and well-settled state law in this area.

V, CONCLUSION

For the above-stated reasons, Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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